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A BRIEF SURVEY OF THE WEST VIRGINIA LAW OF COMPENSABILITY*

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PRIOR to the passage of the West Virginia Workmen's Compensation Act in 1913, the slow moving common law procedures provided the only forum for the enforcement of the employer's obligation to use due care toward an employee while he was on the job, subject, of course, to the three common law defenses.¹ As a result of these three defenses, the employer was able to defend advantageously about seventy per cent of the common law actions. The enactment of the compensation law eliminated the common law action against a subscriber and provided a speedier remedy to the injured employee. Thus, the benefits of chapter 23 are two-fold.² The employer, by becoming a subscriber to the fund, is protected from suits in the courts and the resulting verdicts while the employee is provided with a relatively speedy remedy at a time when he needs it most. It is also advantageous to the employee in that the question of fault or negligence on the part of the employer is no longer a considered factor and he is not barred by his own fault unless it is the result of his wilful misconduct or intoxication.

These rights and remedies are put into effect by the contractual relationship between the employee and his employer, resulting from the statutory provisions giving the employer the

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¹ These were the defenses of contributory negligence, fellow servant's negligence, and assumption of risk.

² Reference to code provisions throughout the text are to W. VA. CODE (Michie 1955). Unless otherwise specified, references to articles and sections without reference to some other chapter of the code are references to Chapter 23.

right to subscribe to the compensation fund and the requirement of notice to the employees of such election. Thus, the employer agrees to contribute to the fund while the employee agrees to waive his right to assert any claims against his employer except for the benefits provided by chapter 23.³ Such agreements are treated as contracts of employment, interpreted and enforced as all other contracts and as binding upon the parties for injuries or death sustained in any place to which such contracts of employment extend the rights of the parties.⁴ The primary problem, then, to be considered is the compensability of a claim, this being a term used to denote the validity or invalidity of the claim filed by an employee, and, as such, it is the initial and perhaps the most important determination which is made regarding such a claim.

To institute a claim for compensation from the fund, it is incumbent upon the employee to file his application in the office of the Commissioner within one year from and after the date of injury. This application is to be made on the form prescribed by the Commissioner, currently designated as Form C. D. 6.⁵

First, considering the period in which an application for compensation must be filed, the West Virginia Supreme Court held in *Young v. State Compensation Comm'r*,⁶ that while the plea of the statute of limitations may be waived in the ordinary case, a public official cannot waive a statute which permits him to consider only such claims as are filed within a particular period. He has no more right to do so than a personal representative would have to waive the Statute of Limitations which had run in favor of his decedent. The court went on to consider all the aspects of article 4, section 15, and cited with approval *Poccardi v. Ott*,⁷ in which it was held that an application for compensation must be filed within the requisite period in the office of the Compensation Commissioner, and that the use of the mails, the date of mailing or posting, the risk of delay in delivery, even where war is being waged, cannot be used to suspend the operation of the statute. Further, the employment of an agent or the use of any agency to bring about a particular result, is made at the risk of the principal, so if the agent fails in his duty, or the selected agency fails to function, the

³ *Hardin v. Workmen's Compensation Appeal Bd*, 118 W. Va. 198, 180 S.E. 670 (1937).

⁴ *Gooding v. Ott*, 77 W. Va. 487, 87 S.E. 862 (1916).

⁵ See W. VA. CODE ch. 23, art. 4, § 15 (Michie 1955).

⁶ 121 W. Va. 126, 3 S.E.2d 517 (1939).

⁷ 83 W. Va. 166, 98 S.E. 69 (1919).

consequences thereof must fall on the principal. The court went on to say that there was no authority to be found which placed upon the employer the duty of filing the employee's application. The employee must actively participate to the extent of not only seeing that his application is completed and signed, but also filed in the Commissioner's office within the statutory period. In no way, manner or means can the employer be held to be an agent for the Commissioner.

In *France v. Workmen's Compensation Appeal Bd.*,⁸ the court stated with approval, in considering the form of application, that where a statute requires the filing of an application on a form prescribed by the Commissioner, anything of less dignity would have no force or effect in the prosecution of a claim for compensation. Thus, it is the prevailing law, as set forth by the supreme court, that the employee must not rely upon anyone for the filing of his application within the requisite one year period at the office of the Commissioner on the form prescribed. This is the employee's mandatory obligation in the prosecution of his claim and such obligation cannot be waived by the Commissioner.

Numerous claims have been rejected on this ground alone regardless of the date of completion of the application or the date of the postmark. Upon receipt of any and all mail, or other papers however received, each document is stamped in the Commissioner's mail room with the date filed. It is this date which is controlling in determining the time of filing in all cases and the jurisdiction of the Commissioner to consider the application. The first factor, then, which is considered in determining the compensability of a claim is, was it timely filed?

The claim is then referred to the accounting division in order that it may be ascertained whether the given employer was a subscriber to the fund at the time of the injury. The West Virginia Code provides,⁹ in part, that failure to pay premiums or to make the quarterly reports as required shall deprive the employer of the benefits and protection afforded by chapter 23, and shall automatically terminate the election of such employer to pay into the fund. This provision applies not only to those who have never been subscribers to the fund but, likewise, to those who had, at one time, elected to participate but who, at the time of the injury

⁸ 117 W. Va. 612, 186 S.E. 601 (1936).

⁹ W. VA. CODE, ch. 23, art. 2, § 5 (Michie 1955).

for which the application was filed, had been suspended for non-payment of premiums. Time after time, an application must be rejected on this account—the employer was not a subscriber to the fund at the time of injury.

Next, it must be shown that the claimant was, in fact, an employee within the meaning of chapter 23, article 2, section 1. This section provides that all persons in the service of a subscribing employer and employed for the purpose of carrying on any industry, business or work in this state are employees within the meaning of chapter 23 and subject to its provisions.

As a general rule, then "employee," as it is used in this section, is applicable to all persons in the service of the employer as defined. However, by its specific terms, section 1 of article 2 makes certain inclusions such as persons regularly employed in West Virginia whose duties necessitate employment of a temporary or transitory nature by the same employer without the state. Thus, where a West Virginia employee is injured while in another state and while performing his duties in accordance with his employment and directly incidental to carrying on an industry in West Virginia, and such visit in the state was merely temporary, the claimant would be an employee within the meaning of this provision and entitled to compensation under the West Virginia act. However, if an individual, though employed by a West Virginia employer, was employed to perform his duties in another state, there being no intention that he ever be employed in West Virginia, and was injured in the other state, he could not be compensated under our act. Section 1 of article 2, while containing these several inclusions, also excludes from coverage certain persons as in the case of a member of a firm of employers, or any official of an association or of a corporation employer, including managers, or any elective or appointive official of the state, county, county court, board of education, municipality or other political subdivisions of the state whose term of office is definitely fixed by law. The last portion of this provision is clear in that any and all elected or appointed officials of the named agencies whose term of office is definitely fixed by law are excluded from the benefits set out in chapter 23.

The first part of this provision, however, has posed some problems. In the case of *West Virginia Coal & Coke Corp. v. State Compensation Comm'r*,¹⁰ the supreme court held that the sole official

¹⁰ 116 W. Va. 701, 182 S.E. 826 (1935).

of a company having managerial duties must be deemed a manager in fact as well as in name, and, as such, is definitely excluded from the protection of the act. The following guide was expressed by the court. "The situation must be gauged by the duties and responsibilities of the person in question, and not by the name that is applied to his position. . . ."¹¹ Thus, realizing that this case applied solely to the case of a "manager," the difficulty arises concerning the legislative intention regarding a member of a firm of employers, or any official of an association or of a corporate employer. There is no case law in West Virginia relating to these persons, but a search of other jurisdictions in which there are similar statutes reveals that such persons are definitely excluded from the protection of the fund regardless of what they were doing at the time of injury.

Therefore, pursuant to the above discussion, an official of a corporation, elected or appointed according to charter or by-laws, is definitely excluded from the benefits of the fund as not being an employee within the meaning of the act.

The particular section now under discussion, section 1 of article 2, also provides that this chapter shall not apply to persons whose employment is prohibited by law. With this exclusion, the claim of a minor who was employed in a proscribed occupation or while under a specific age is the situation with which we are generally concerned.

In the first instance, the payment of premiums into the fund does not protect an employer against the action of a minor unlawfully employed by him and, in such cases, the rights and liabilities of the employer and employee are controlled by the common law principles applicable to master and servant.¹²

In the second instance, the unlawfully employed minor would be precluded from the benefits provided by the fund.¹³

However, it is to be noted, and as already impliedly pointed out, that nothing in our Workmen's Compensation Act prohibits an employer, who qualifies thereunder, from engaging the services of a minor simply because he is, in fact, a minor. The statutory inhibitions against the employment of minors in West Virginia are

¹¹ *Id.*, at 702, 182 S.E. at 827.

¹² *Jackson v. Monitor Coal & Coke Co.*, 98 W. Va. 58, 126 S.E. 492 (1925); *Morrison v. Smith-Pocahontas Coal Co.*, 88 W. Va. 158, 106 S.E. 448 (1921).

¹³ *Irving v. Union Tanning Co.*, 97 W. Va. 388, 125 S.E. 110 (1924).

found outside the chapter relating to compensation.¹⁴ These provisions prohibit the employment of minors under sixteen generally, and prohibits employment in certain industries, such as mining, dealing in explosives, etc.,—until the age eighteen. This legislation impliedly sanctions the employment of minors not specifically prohibited, and the “unlawfully employed” provisions of the compensation act are not deemed to exclude such minors from the benefits and limitations of the act.¹⁵

However, it should be pointed out that the Department of Labor has promulgated, by authority of statute, rules concerning persons in a particular age group as being employed in certain occupations. Rule 23 of the Rules and Regulations of the Workmen's Compensation Commissioner provides:

“A ruling by the Commissioner of Labor that the employment of a particular child is legal will be accepted as final by the Workmen's Compensation Commissioner, and protection in respect to such employment will be granted accordingly.”

At the beginning of this subject on employees, a general rule was given, to-wit, that the word “employee” as it is used in this section, is applicable to all persons in the service of an employer. The discussion thus far of some of the definite inclusions and exclusions has left open the consideration of the general proposition of the employer-employee relationship and the exclusion of the independent contractor.

The court held in *Basham v. County Court*¹⁶ that a contract of employment for remuneration is necessary to constitute the relation of employer and employee under the compensation act. In distinguishing that relationship from that of independent contractor, the court said in *Crowder v. State Compensation Comm'r*,¹⁷ that where services are being rendered by one person for another, it is ordinarily considered that there exists between them the relation of employer and employee and not employer and independent contractor, if the former retains the right to supervise the services, direct the manner of their execution and summarily discharge the person rendering the services if the same be not rendered satisfactorily to the employer. This distinction has to be made since an independent contractor is not an employee as defined and is not

¹⁴ W. VA. CODE, ch. 21, art. 6, §§ 1, 2 (Michie 1955).

¹⁵ *Adkins v. Hope Engineering & Supply Co.*, 81 W. Va. 449, 94 S.E. 506 (1917).

¹⁶ 114 W. Va. 376, 171 S.E. 893 (1933).

¹⁷ 115 W. Va. 12, 174 S.E. 480 (1934).

insurable against personal injuries to himself by the act while carrying out his independent business.¹⁸ It would appear, then, that in all of these situations, the nature of the contract is primarily controlling—is it a specific contract to do a particular job or is it merely a general contract of employment? Second, who has the right of control over the job as provided in the specific contract? But, it will apparently make little difference regarding the method of payment or as to the right to employ or discharge. It is the control of the job, and probably not as to the general premises, which is determinative in the final analysis.¹⁹

Before leaving this topic, it should be noted that the compensation law applies to employers and employees engaged in interstate commerce under specific terms of the act.²⁰

The foregoing is perhaps an incomplete discussion of the employee aspect in compensation claims, but it does outline the basic principles used in determining whether the persons involved are employees within the meaning of the act. If they fail to come within the general principle or within one of the specific inclusions, compensation must be denied. A similar result is reached if the claimant comes within a definite exclusion. However, it is to be observed that the proportionate number of claims which are rejected on the ground of the claimant not being an employee within the meaning of the act is small in relation to the other causes for rejection.

We have dispensed with what might be termed as the preliminary aspects of a claim and have found that the employee's application was filed within the requisite period, that he was an employee within the meaning of the act and that his employer was a subscriber to the fund at the time of the injury. Now we turn to the core of our compensation law—the relationship between the injury and the employment.

The West Virginia Code provides that the Commissioner shall disburse the Workmen's Compensation Fund to the employees who shall have received personal injuries in the course of and resulting from their employment.²¹ It need not necessarily involve actual

¹⁸ *Rawson v. Jones-Winifrede Coal Co.*, 100 W. Va. 263, 132 S.E. 885 (1925).

¹⁹ See also, *Null v. State Compensation Comm'r*, 128 W. Va. 6, 35 S.E.2d 359 (1945); *E. C. Klipstein & Sons Co., v. State Compensation Comm'r*, 113 W. Va. 567, 169 S.E. 169 (1933).

²⁰ W. VA. CODE ch. 23, art. 2, § 10 (Michie 1955).

²¹ W. VA. CODE ch. 23, art. 4, § 1 (Michie 1955).

physical trauma, but may include such conditions as occupational disease. However, regarding the compensability of the injury aspect as distinguished from occupational disease, in *Montgomery v. State Compensation Comm's*,²² the court stated:

"It is settled law in West Virginia that under the Workmen's Compensation Act disease, whether occupational or not, is not a personal injury within the meaning of Code, 23-4-1, and is not compensable, unless it is attributable to a specific and definite event arising in the course of and resulting from employment. It is equally well settled in West Virginia that disease that is attributable to a specific and definite event arising in the course of and resulting from employment, is compensable. [citing cases] On the basis of these decisions, it is clear that the term 'personal injury' as used in the Workmen's Compensation Act of this state contemplates and includes the result of unusual exposure, shock, exhaustion, and other conditions not of traumatic origin provided that they are attributable to a specific and definite event arising in the course of and resulting from employment."

In any event, the disability for which compensation is sought must be such as one would reasonably expect to have been incurred from an occupational incident and, more specifically, such as would reasonably be expected to have been incurred from the incident as alleged. Thus, it must have been the result of employment.

It must appear, then, that there is a casual connection between the conditions under which the work was required to be performed and the unfortunate ending—the personal injury. It will be, perhaps, simpler to discuss this element from the standpoint of each of several classifications.

First, there is unquestioned coverage under the compensation law where the injury is directly associated with the employment such as a fractured femur or laceration of the forearm due to machinery breakage, falling equipment, explosions, slate falls and the like. These are the simplest to administer and, barring any extraneous difficulties, they would be handled as a routine matter.

Second, there are those risks which are personal to the employee and which are universally not compensable, as where death is due solely to natural causes even though the employee was at work at the time.

Third, there are those which might be called neutral risks—those which have no particular character of employment or personal

²² 116 W. Va. 44, 178 S.E. 425 (1935).

nature. The trend in these cases is to tip the balance in favor of the employee under the theory that the incident occurred while the employee was working and there was nothing to show a connection with the employee personally. Thus, although the work connection is slight, it is at least stronger than any connection with the employee's personal life.

Fourth and last, there are the mixed risks which are probably best illustrated by an aggravation of a pre-existing disability. This type is perhaps the most difficult of the claims to administer so some further discussion will be made with respect to this problem.

The basic proposition in this matter as it is now applied in West Virginia, appears to be erroneously based on a statement made by Judge Maxwell in a concurring opinion to *Caldwell v. Workmen's Compensation Comm'r*,²⁴ wherein an appeal was taken from an order denying compensation, such order being reversed by the supreme court pursuant to the majority opinion. Judge Maxwell stated:

"An employee is certainly none of the less entitled to compensation because he is unfortunate enough to carry on his body the effects of a former or primary injury, even though a later injury, being the one for which he seeks compensation, would not have been so serious but for the lingering effects of the former."

The *Caldwell* case has been cited in subsequent cases as authority for this proposition, namely, *Martin v. State Compensation Comm'r*,²⁵ which will be discussed later, and *Gobel v. State Compensation Comm'r*.²⁷ The latter case, which involved an existing arthritis condition, awarded compensation on the basis of the *Caldwell* "rule" though there is no syllabus point on the subject.

In *Hall v. State Compensation Comm'r*,²⁸ the principal involved was set out in the syllabus as applying to an existing disease.²⁹ Thus, it would appear that while the *Caldwell* case, *supra*, was originally erroneously cited for the basic proposition, the principle has become an established rule of law in West Virginia compensation cases.

²³ *Id.*, at 46, 178 S.E. at 426.

²⁴ 106 W. Va. 14, 144 S.E. 568 (1928).

²⁵ *Id.*, at 18, 144 S.E. at 569.

²⁶ 107 W. Va. 583, 149 S.E. 824 (1929).

²⁷ 111 W. Va. 404, 162 S.E. 314 (1932).

²⁸ 110 W. Va. 551, 159 S.E. 516 (1931).

²⁹ See *Manning v. State Compensation Comm'r*, 124 W. Va. 620, 22 S.E.2d 299 (1942).

In *Gilbert v. State Compensation Comm'r*,³⁰ the employee appealed a ruling denying him compensation for an acute dilatation of his heart allegedly incurred while he was lifting sacks of grain. There was no conflicting testimony offered as to his previous good health, with his present condition, according to the examining physician, not being attributable to anything other than extreme exertion. Thus, noting that the record shows the disability to be the result of a definite, isolated and fortuitous occurrence, the court stated:

"An acute dilation of a normal heart, superinduced by an unusual lift or strain occurring in the course of and resulting from employment, is a compensable injury within the meaning of West Virginia Code 23-4-1."³¹

However, the *Gilbert* case is distinguishable from the *Martin* case, *supra*, where the record showed that the deceased shoved a loaded mine car approximately forty feet "with great effort" and then complained of a pain in his chest. Ten minutes later he was dead. An autopsy was performed which showed a greatly enlarged heart, that the heart muscles had undergone fatty degeneration and that there were many friable negations on the mitral and aortic valves varying in size. The examining physician stated that though the proximate cause of death was the exertion involved in moving the car, such exertion could not have caused death without the existing organic disease described as a chronic endocarditis of long standing and chronic rheumatism. In the physician's opinion, anything which the deceased might have done would have produced the same result. Martin's widow was denied compensation on the ground that death was caused by a heart disease and not by an injury received in the course of and resulting from employment with an appeal being taken therefrom. The court cited the *Caldwell* proposition as the well settled rule but went further and stated:

"[T]his does not dispense with the necessity of showing that the injury was actually caused by accident or an injury received in the course of and arising from the employment. . . . Without analyzing and discussing, [the decisions as cited] it may be deduced therefrom that compensation will not be awarded where the employee has chronic heart trouble which has reached such a stage that death is liable to ensue at anytime, from any exertion and death came while he was doing the ordinary work of his employment. . . . In compensation cases,

³⁰ 121 W. Va. 10, 1 S.E.2d 167 (1939).

³¹ *Id.*, at Syl. 1.

as in other cases, the familiar rule is applicable that the burden of proving that there was an injury is upon the applicant and where the evidence is equally consistent with an injury or no injury, the burden is not discharged. In the case under consideration, there were no external or internal marks or evidence of injury. Moreover, it was shown that moving loaded cars was not unusual, although coal loaders were not required to do so. It was the ordinary and not the unusual labor which he was performing.”³²

Thus, the court affirmed the ruling denying compensation and, in the later *Gilbert* case, *supra*, distinguished the two situations on the basis of Martin’s chronic heart condition thus, though he did die in the course of his employment, he did not die as a result therefrom. Therefore, in the *Martin* case, *supra*, the risk was deemed personal to the employee.³³

The foregoing has been a summary discussion of the “result of employment” element as relating to the origin or cause of the personal injury. Other than casual reference, there has been no previous mention in this paper to another important factor—the “course of employment” requirement as related to the time, place and circumstances or activity out of which the alleged incident occurred.

It must then be determined whether the personal injury was incurred within the period of employment, at a place where the employee was reasonably expected to be (zone of employment) and while he was fulfilling his duties or engaged in doing something incidental thereto (scope of employment). This is a necessary element of compensability just as the “result of employment” element was, since our court has conclusively established that these two phrases are not synonymous. It is absolutely necessary that both exist concurrently and simultaneously, for one without the other will not sustain an award of compensation.³⁴

There have been numerous cases decided by our supreme court on the issue of “course of employment” and no attempt will be

³² *Martin v. State Compensation Comm’r*, 107 W. Va. 583, 587, 149 S.E. 824, 826 (1929).

³³ See *Williams v. State Compensation Comm’r*, 127 W. Va. 78, 81 S.E.2d 546 (1944) for an exhaustive discussion on heat prostration or exhaustion cases in which the court said that the same basic rules would apply to heart cases.

³⁴ See *Dameron v. State Compensation Comm’r*, 109 W. Va. 343, 155 S.E. 119 (1930); *Archibald v. Workmen’s Compensation Comm’r*, 77 W. Va. 448, 87 S.E. 791 (1916).

made to cite them all. However, to illustrate the three components of this basic element, the following cases are submitted for consideration.

In *De Constantin v. Public Service Comm'n*,³⁵ the court said that employment is not limited to the exact moment of arrival at the place of work, nor to the moment of retirement therefrom. It includes a reasonable amount of time before and after actual work. Similarly, the court in *Miller v. State Compensation Comm'r*,³⁶ stated that it was the well established rule, justified by our liberal construction of the compensation law in favor of employees, that injuries incurred while making use of plant facilities, immediately connected in point of time with a day's work, are compensable.

Thus, it may be concluded that the personal injury need not have occurred between the hours of nine and five in order to meet this requirement but could occur some period of time before or after the day's work depending on the circumstances of the particular situation.

Second, it is the general rule that the employer's responsibility under the compensation act is limited to injuries incurred on his premises.³⁷ However, this general proposition is subject to its exceptions and the best case discussing the points to be considered is *Carper v. State Compensation Comm'r*.³⁸ In analyzing its previous decisions, the West Virginia Supreme Court makes the following deductions:

"1. Compensation may be allowed for injuries sustained by an employee while going to or from work, if sustained within the zone of his employment;

2. No definite rule can be laid down as to what is the zone of employment, and each case must be decided on its own facts and circumstances;

3. Injuries sustained on public highways, while traveling the same in common with the general public, are not, in the absence of special circumstances or contract requirements, compensable;

4. Whether or not an injury is compensable is not determined alone by its occurrence on or off the premises of the employer; and

5. The term 'zone of employment' implies reasonable proximity to the place of employment."³⁹

³⁵ 75 W. Va. 32, 83 S.E. 88 (1914).

³⁶ 126 W. Va. 78, 27 S.E. 586 (1943).

³⁷ See *Wilkin v. H. Koppers Co.* 84 W. Va. 460, 100 S.E. 300 (1919).

³⁸ 121 W. Va. 1, 1 S.E.2d 165 (1939).

³⁹ *Id.*, at 3, 1 S.E.2d at 166.

In that case it was found that miner's residences owned by the employer and leased to his employees, and roads leading thereto, which were separate and apart from the plant equipment and facilities of the mine, were not within the employees' zone of employment, for while the injury might have been incurred on the employer's property as related to ownership, it was not incurred on his premises pursuant to the reasonable interpretation placed thereon.

In *Evans v. State Compensation Comm'r*,⁴⁰ however, the court used the basic principles set out in the *Carper* case, *supra*, and distinguished it in holding that a private road connecting different parts of a coal mining plant and used by employees in going to and from their work, is within the employee's zone of employment.

The case of *Canoy v. State Compensation Comm'r*,⁴¹ illustrates a public highway situation wherein the court stated that an injury or death of an employee occurring on a public highway and not on the premises of the employer gives right to participate in the fund when the place of injury was brought within the scope (zone) of employment by an express or implied requirement of the contract of employment of its use by the employee in going to and returning from work. This is an example of point three as taken from the *Carper* case, *supra*.

Thus, compensation is not to be denied simply because the occurrence did not take place on the employer's premises, and each case must again be decided on its own facts and circumstances.

Finally, the personal injury must have been incurred while the employee was fulfilling his duties or engaged in doing something incidental thereto. This component of "course of employment" may be best illustrated by the following situations although these going to and from work cases are likewise appropriate.

In *Archibald v. Workman's Compensation Comm'r*,⁴² the court held that acts of ministration by an employee unto himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, etc., the performance of which occurs while he is at work and which are readily conceivable to be reasonably necessary to his health and comfort, are incidental of his employment

⁴⁰ 124 W. Va. 336, 20 S.E.2d 172 (1942).

⁴¹ 113 W. Va. 914, 170 S.E. 184 (1933).

⁴² 77 W. Va. 448, 87 S.E. 791 (1916).

within the meaning of the compensation act. Thus, an accidental injury sustained in the performance of such an act is compensable even though the act engaged in was, in a sense, merely personal to himself and only remotely and indirectly necessary to the object of employment.

In *Williams vs. State Compensation Comm'r*,⁴³ a similar result was reached when an employee, during his lunch hour, was injured while going for a drink of water. The court found such an injury, being sustained at that particular time and while on the employer's premises with the direct or implied knowledge and consent of the employer, to be compensable. In addition to meeting the other requirements, the employee was still within the scope of his employment.

As is readily observed, the phrases "course of employment" and "resulting from employment" and their various components are rather difficult to distinguish and consider separately. As a practical matter, detailed and categorical analysis of each of the factors previously mentioned is unnecessary with the great majority of claims. The pieces of the average claim fit in nicely with the overall puzzle and, if there is a unique question involved, it will ordinarily stand out like the proverbial sore thumb. It is only in these exceptional situations that knowledge of the particular facts and the applicable law is necessary to analyze the circumstances and determine how it affects the compensability of the claim.

There is one portion of chapter 23 which warrants consideration. Reference is made to article 4, section 2 of the compensation act which states in part that no employee shall be entitled to receive any benefits from the fund on account of any personal injury caused by wilful misconduct, wilful disobedience to such rules and regulations as may be properly adopted, intoxication, or the failure to use properly prescribed protective or safety appliances. The limitations expressed in this section are more theoretical than actual, since, as a practical matter, they are exceedingly difficult to establish.

Under this section it would appear to be established that if an employee should do some act which he has been instructed not to do or if he should perform some act outside the realm of his assigned duties, and is injured as a result of that action, he did so at his own peril and is precluded from being compensated therefor subject, of course, to the "impulsive or spontaneous act" theory.

⁴³ 114 W. Va. 37, 170 S.E. 775 (1933).

Admittedly, mere violations of instructions and the doing of hazardous acts are not, of themselves, wilful misconduct as a matter of law, so as to preclude compensation under our statute. But either the intentional doing of an act with the knowledge that it is likely to result in injury, or acting with wanton and reckless disregard of possible consequences, combined with the violation of instructions, is sufficient to constitute wilful misconduct within the meaning of the act.⁴⁴

A reference should be made to section 7 of article 4 of the compensation act wherein the legislature set out specific requirements in all hernia claims as follows:

"In all claims for compensation for hernia resulting from personal injury received in the course of and resulting from employment, it must be definitely proven to the satisfaction of the Commissioner:

First, that there was an injury resulting in hernia;

Second, that the hernia appeared suddenly;

Third, that it was accompanied by pain;

Fourth, that the hernia immediately followed an injury;

Fifth, that the hernia did not exist prior to the injury for which compensation is claimed. . . ."

Most of the cases involving this type of claim turn on the evidence of the existence or nonexistence of a pre-existing hernia and the prevailing rule appears to put the burden on the employee to produce medical proof as to the non-existing hernia even though there is no evidence to the contrary. However, where there is a conflict with respect to an injury, it must be resolved in favor of the employee, although there are no cases directly in point regarding the first four requirements.⁴⁵

⁴⁴ See *Ragle v. State Compensation Comm'r*, 125 W. Va. 450, 24 S.E.2d 756 (1943); *Red Jacket Consol. Coal & Coke Co., v. State Compensation Comm'r*, 111 W. Va. 425, 162 S.E. 665 (1932). See also, *Stevely v. State Compensation Comm'r*, 125 W. Va. 308, 24 S.E.2d 95 (1943).

⁴⁵ See, *Szalay v. State Compensation Comm'r*, 127 W. Va. 449, 33 S.E.2d 236 (1945); *Rapp v. State Compensation Comm'r*, 126 W. Va. 227, 27 S.E.2d 588 (1943); *Jordan v. State Compensation Comm'r*, 120 W. Va. 142, 197 S.E. 20 (1938); *Aniel v. State Compensation Comm'r*, 112 W. Va. 645, 166 S.E. 366 (1932); *Pollardi v. Public Service Comm'r*, 75 W. Va. 542, 84 S.E. 242 (1915).

The remaining portion of W. VA. CODE, ch. 23, art. 4, § 7 (Michie 1955) deals with the requirement that the employee submit to a radical operation and the benefits allowed from the fund. Dealing with this provision, see, *Johnson v. State Compensation Comm'r*, 128 W. Va. 37, 35 S.E.2d 677 (1945); *Shrewsbury v. State Compensation Comm'r*, 127 W. Va. 360, 32 S.E.2d 361 (1944); *Cole v. State Compensation Comm'r*, 113 W. Va. 579, 169 S.E. 165 (1933); *Myers v. State Compensation Comm'r*, 113 W. Va. 316, 167 S.E. 740 (1933); *Myers v. State Compensation Comm'r*, 110 W. Va. 425, 158 S.E. 512 (1931).

What has been attempted here is a summary of some of the major problems found in the West Virginia law of compensability, relating to timeliness of claims, the requirements of employer-employee relationship, and the casual connection between employment and injury. Within the limits of this undertaking exhaustive treatment of these problems would have been inappropriate, yet it is hoped that a better understanding of this complex subject has been accomplished.